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**EPA AT HELM'S DEEP: SURVIVING THE FOURTH ATTACK ON
ENVIRONMENTAL LAW**

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Essay

EPA AT HELM'S DEEP: SURVIVING THE FOURTH ATTACK ON ENVIRONMENTAL LAW

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INTRODUCTION

In the second volume of J.R.R. Tolkien's *The Lord of the Rings*, Theoden, King of Rohan, learns that the armies of Saruman, the evil wizard, are advancing upon the defenseless city. He therefore orders the citizens to relocate to Helm's Deep, a massive fortress carved into the side of a mountain that has heretofore remained impenetrable. With the help of some elven allies who arrive in the nick of time from Rivendell, the Rohan soldiers repel wave after wave of attacks by the vicious Uruk-hai. As one wall is breached, the soldiers fall back behind an interior wall until at last there is nowhere to retreat. At that point, the king seizes the offensive, orders his soldiers to mount their steeds and take the battle to the enemy. Fortunately, at that moment Gandalf, a good wizard, returns to Helms Deep with a band of Rohan mounted soldiers, and the two armies put the enemy to rout.¹

For much of the past 30 years, the Environmental Protection Agency ("EPA") and the laws that it administers have been under siege, much like the people of Rohan, from powerful economic, ideological and political actors who believe that the companies subject to EPA's regulatory authority should have greater freedom to go about their business unimpeded by "senseless" and "burdensome" regulations. The assaults came in three waves that peaked during the first years of the Reagan Administration, the first year of the 104th Congress, and the first six years of the George W. Bush *206 Administration. During the first two years of the Obama Administration, EPA seized the offensive. Unlike the heroes of Helm's Deep, however, the forces of environmental progress were driven back behind the ramparts after only two years by a wholly unanticipated fourth assault from a reinvigorated business community that took advantage of an economic crisis brought on by the lack of federal regulation of the banking industry to inspire a populist uprising that inexplicably blamed federal regulation for the nation's current economic woes. Whether EPA and the foundational environmental laws that it implements will survive this fourth assault is by no means clear.

I. THE FIRST ASSAULT: THE REAGAN ADMINISTRATION

Ronald Reagan, the genial governor of California, was an unlikely choice for the general's role in the business community's first assault on federal environmental regulation when he became one of the country's first conservative radio stars in 1975 with a folksy message touting the virtues of free markets.² But he aggressively assumed that role during his 1980 presidential campaign when he declared that air pollution had been "substantially controlled" and promised to invite the steel and coal industries to help him "'rewrite clean air rules."³ Upon assuming office, President Reagan made "regulatory relief" one of the four primary goals of his "economic recovery program."⁴

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

Soon after the election, a "Coalition on Regulatory Reform" created by the U.S. Chamber of Commerce assembled more than sixty "strategy groups" from different industries to coordinate strategy.⁵ It hit the ground running with a "hit list" of federal regulations that had to be repealed or revised by agencies headed by people who met a list of qualifications that the Chamber generously *207 provided to the president.⁶ OMB Director-designate David Stockman announced that the administration would locate the "environmentalists, the solar power freaks, the Naderites" and "throw them out."⁷

Because the Democrats remained firmly in control of the House of Representatives, the administration pursued regulatory relief through agencies headed by business-friendly administrators subject to careful oversight and control by the White House's Office of Management and Budget and a special "Task Force on Regulatory Relief" headed by Vice-President George H.W. Bush.⁸ The Task Force asked the business community to nominate federal regulations for revision or repeal, and it drew on those recommendations to prepare "hit lists" for the agencies to use as part of an overall requirement to re-evaluate all existing regulations.⁹ The extent to which OMB's Office of Information and Regulatory Affairs ("OIRA") was taking its cues from the regulated industries remained hidden behind its closed doors until congressional committees launched a series of hearings into OIRA's role in agency rulemaking in 1983.¹⁰

EPA Administrator Anne Gorsuch had been one of the leaders of a small band of extremely conservative Colorado state legislators who called themselves "the crazies."¹¹ She and her close associates believed they had a mandate to roll back the agency's regulatory *208 programs, and they adopted three strategies to accomplish that goal. First, they replaced career civil servants in mid-level management positions with ideologues who were wholly unqualified for those jobs. Second, they initiated a series of reorganizations aimed primarily at enhancing their control over the civil service staff. Third, they negotiated directly with the regulated industries, thereby undercutting the professionals in the program offices who were attempting implement the environmental statutes as written.¹²

The Reagan Administration also launched an assault on EPA's budget. Unsatisfied with Gorsuch's request for a 20 percent reduction in the agency's appropriation, OMB demanded even more draconian cuts.¹³ OMB explained that "fewer regulators will necessarily result in fewer regulations and less harassment of the regulated."¹⁴ With the help of industry lobbyists, the administration persuaded Congress to accept most of these cuts.¹⁵ The budget reductions and Gorsuch's open contempt for the EPA career staff resulted in the resignations of almost 4,000 seasoned employees, a devastating loss for the fledgling agency.¹⁶

These institutional changes had a profound impact on the content and quantity of the EPA's regulations.¹⁷ The agency's approach to enforcement under Administrator Gorsuch also departed radically from that of her predecessors. In Gorsuch's view, the goal should be to encourage voluntary compliance, not punish past violations.¹⁸ Mid-level career managers perceived a "deliberate plan to paralyze if *209 not totally dismantle the enforcement program."¹⁹ Between June 1981 and July 1982, the number of civil and criminal cases that EPA referred to the Justice Department declined by 84 percent.²⁰

When a congressional committee attempted to probe the precipitous decline in enforcement at EPA, the head of the Department of Justice's ("DOJ") Office of Legal Counsel instructed EPA to withhold DOJ-designated "enforcement sensitive" documents.²¹ The dispute over documents erupted into a full-scale constitutional confrontation over executive privilege.²² EPA's relationship with Congress deteriorated even farther when a committee investigating Assistant Administrator Rita Lavelle's administration of the Superfund program discovered that she had lied in her testimony and ordered her staff to shred documents relevant to the committee's inquiry. Gorsuch fired Lavelle in early February 1983 before resigning herself

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

under pressure in early March.²³ The first assault on EPA ended at that point with the agency in organizational shambles, bereft of resources, and unsure of its mission. But its statutory authority remained untouched by the assaults from within the administration, and it still retained many high-quality professionals on its career staff.

II. THE SECOND ASSAULT: THE GINGRICH CONGRESS

President George H.W. Bush promised that he would be the “environmental President,” and he initially stressed pragmatism and *210 administrative competence over ideology.²⁴ He appointed William K. Reilly, a highly regarded conservationist, to head the EPA.²⁵ With the strong support of President Bush and the agency staff, Reilly worked with Congressman Henry Waxman to enact the comprehensive 1990 amendments to the Clean Air Act over the opposition of the regulated industries and some strong internal opponents within the administration.²⁶

President Clinton wanted to “reinvent” government to make it more transparent and effective, but also to make it less intrusive than it had been during the 1970s. President Clinton appointed Carol Browner, the 37-year-old head of Florida's Department of Environmental Regulation, to be EPA administrator.²⁷ Like President Bush, President Clinton retained the interagency review process under OIRA, and he gave Vice President Gore final responsibility for resolving interagency disputes.²⁸ Although modest budget cuts hampered the agency's efforts to implement the new Clean Air Act through rulemaking, the agency filed a record number of enforcement actions in 1993, and it broke that record in 1994 by filing 2,246 actions.²⁹

The industry launched the second assault on EPA immediately following the 1994 off-year elections in which the Republican Party gained control of both the House and the Senate.³⁰ The field marshal *211 for the second assault was Newt Gingrich (R-Georgia), the strategically brilliant, but highly abrasive leader of the conservative wing of the Republican Party.³¹ The marching orders were contained in the Contract with America, a carefully crafted list of ten legislative initiatives that Republican candidates had promised to complete within 100 days.³² Under the new majority leader, Richard K. Armey (R-Texas), a small team of conservative activists called the Speaker's Advisory Group rode herd over committee chairmen who no longer controlled the legislative agenda.³³ Republican Whip Tom DeLay called EPA “the Gestapo of government,” and urged his colleagues to repeal the Clean Air Act.³⁴ The Cato Institute declared that “Congress must jettison the entire foundation of modern environmental law if it hopes to provide regulatory relief for a battered economy and environmental protection for generations to come.”³⁵

Having contributed heavily to the Republican victory, regulated industries expected access to the legislative process, and they got it.³⁶ Delay assembled an umbrella group, called “Project Relief,” consisting of more than 300 companies, trade associations and lobbyists who committed their time and resources to promoting the leadership's regulatory reform bills.³⁷ With a budget approaching \$30 *212 million and operating out of one of the Republican leadership's Capitol Hill offices, Project Relief lobbyists drafted legislation, prepared talking points for committee chairmen, briefed committee staffers and the press, and ran expensive vote counts for the leadership.³⁸

The second assault proceeded along three major fronts. First, the leadership introduced “omnibus” regulatory reform legislation that would have imposed numerous procedural and analytical requirements on agency rulemaking and required agencies to base their regulations on formal cost-benefit analysis. Second, it attempted to repeal or substantially rewrite statutes like the Clean Water Act to make them far friendlier to regulatees. Third, it launched piecemeal attacks on the federal bureaucracy

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Envtl. L....

through funding cuts and riders to important bills that were aimed at preventing the agencies from carrying out their statutory responsibilities. The leadership singled out EPA and its statutes for special attention.³⁹

Rather than rallying the troops to the battlements, a disheartened President Clinton initially ceded the leadership role to the Republicans and scrambled to co-opt the radical attacks by “reinventing” the environmental laws instead abolishing them. He ordered every regulatory agency to comb through every existing regulation and eliminate all “obsolete” and “unnecessary” requirements.⁴⁰ EPA reported in June 1995 that its line-by-line review of 12,766 pages of the Code of Federal Regulations had identified almost 1500 pages that could be deleted.⁴¹

***213** The House passed an omnibus bill that required EPA and other regulatory agencies to prepare detailed risk assessments and extensive quantitative cost-benefit analyses for all “major” rules.⁴² Omnibus regulatory reform did not fare as well in the Senate, however, where an even more intrusive version of the bill failed to attract the 60 votes needed to overcome a filibuster from pro-environment Democrats.⁴³

After chairing seven days of hearings and soliciting input from several industry task forces, House Transportation and Infrastructure Committee chairman Bud Shuster (R-PA) introduced industrydrafted amendments to the Clean Water Act that would have rewritten all of the core provisions of the 25-year-old statute to reflect a decidedly laissez faire approach to water pollution.⁴⁴ To head off the attacks, public interest groups seized the high ground by exposing the blatant influence peddling that had occurred and attempting to put a human face on the issues by flying in victims of environmental pollution for congressional hearings.⁴⁵ As these counterattacks gained traction, the White House jumped on the environmental bandwagon and began to issue veto threats.⁴⁶ Although the House quickly passed the Schuster bill with only minor amendments,⁴⁷ President Clinton did not have to veto it because the moderate Republican chairman of the Senate Committee on ***214** Environment and Public Works declined to schedule it for a committee markup.⁴⁸

Having failed on the first two fronts, the radical reformers amassed on the third front -- the FY 1996 appropriations bill. In the House version of the bill, EPA's funding was cut by almost one-third, and its enforcement budget was cut in half. Majority whip Tom DeLay insisted upon adding 17 deregulatory riders to EPA's appropriation bill that would have, among other things, prevented EPA from promulgating industrial effluent and stormwater discharge limitations under the Clean Water Act, enforcing its wetlands protection program, implementing or enforcing the recently enacted Clean Air Act permit requirements, and promulgating hazardous air emissions standards for refineries.⁴⁹ The Senate cut EPA's budget by 15 percent and added riders that would have prohibited EPA from issuing drinking water standards for arsenic and radon, vetoing wetlands permits issued by the Corps of Engineers, and adding new sites to the superfund list.⁵⁰ The Conference Committee cut EPA's budget by 14 percent, deleted the House riders, and allowed the Senate's riders to stand.⁵¹

On November 13, 1995, President Clinton vetoed a continuing resolution that, among other things, contained the entire House omnibus regulatory reform bill as a rider, and all nonessential federal employees went on leave without pay the next day.⁵² After a “clean” continuing resolution provided a brief respite, the government shut down again on December 15, 1995.⁵³ The second shutdown came to an end on January 6, 1996 pursuant to another stopgap continuing resolution. Finally, on April 26, 1996, Congress passed and the President signed a FY 1996 appropriations bill. The bill, which would be in effect for only six months, set EPA's budget at just under its FY 1995 level. In a clear victory for the Administration, it also ***215** dropped the some of the Senate's environmental riders and weakened others.⁵⁴ The Administration's victory marked the end of the second assault on environmental regulation, as even Tom DeLay admitted that “we have lost the debate on the environment.”⁵⁵

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

EPA began to ease out of its defensive posture after the Republican capitulation in the budget standoff in early 1996, and President Clinton's easy re-election victory later that year. Aided by steadily increasing budgets, Administrator Browner pressed the staff to promulgate many long-delayed regulations, including ambitious revisions to the national ambient air quality standards for ozone, more stringent limitations on emissions from diesel engines, and an aggressive program for limiting interstate air pollutions.⁵⁶ During the last two years of the Clinton Administration, EPA initiated dozens of enforcement actions against aging refineries and power plants that had unlawfully undergone modifications that significantly increased emissions without undergoing new source review.⁵⁷

III. THE THIRD ASSAULT: THE GEORGE W. BUSH ADMINISTRATION

A. Introduction

With a Republican president and Republican majorities in both houses of Congress following the 2000 elections, the stage was set for the third assault on environmental regulation. The industry's legislative agenda was briefly waylaid, however, when their aggressive efforts to roll back environmental protections so alienated a moderate senator from Vermont that he abandoned the Republican Party and the Democrats regained control of the Senate. That, too, *216 changed in 2002 when voters put Republicans firmly in control of both houses.⁵⁸ By then, however, a series of business scandals involving Enron, Worldcom and others made it much more difficult for the Republican majorities to enact radical revisions to the regulatory statutes. Nevertheless, a determined George W. Bush Administration, operating without significant congressional oversight, achieved many of the industry's goals administratively by weakening existing regulations, slicing regulatory agency budgets, and cutting back on enforcement.

Christine Todd Whitman was President Bush's choice for EPA Administrator. Like Bush, Whitman was the governor of a populous state with serious environmental problems (New Jersey), and, like Bush, she had attempted to address those problems with market-oriented approaches that were not unduly burdensome to powerful economic interests.⁵⁹ Whitman quickly made her presence felt by reorganizing the agency's rulemaking procedures to assign a much more prominent role to the agency's economists.⁶⁰ She also supported the administration's attempts to reduce EPA's budget, especially in the area of enforcement.⁶¹ Whitman's appeal for "smarter regulation" translated in practice into less regulation as EPA stressed voluntary approaches and accommodation over stringent rulemaking and strict enforcement.⁶² Although the Administration expressed great respect for science in regulatory decision-making, it tended to disregard scientific studies and analysis that pointed in the direction of greater regulation.⁶³ Not surprisingly, staff morale sank *217 to levels not experienced since the early years of the Reagan Administration.⁶⁴

B. Approach to Environmental Regulation

The Bush Administration demonstrated a consistent tendency to pursue less ambitious environmental goals that were sometimes at odds with the environmental statutes. For example, EPA proposed to withdraw the Clinton Administration's "midnight" regulations establishing a standard for arsenic in drinking water on the ground that it may have been the result of "a rushed decision."⁶⁵ After a firestorm of public protest, however, the agency allowed the Clinton Administration version of the arsenic rule to remain in effect.⁶⁶ EPA undertook very few new initiatives to achieve environmental improvement when not compelled by statute to do so.⁶⁷ Yet, despite her business-friendly approach to regulation, Administrator Whitman spent most of her two-year tenure in conflicts with OIRA and political operatives in the Office of the Vice President.⁶⁸

C. Clear Skies Legislative Initiative and Associated NSR Regulations

The Bush Administration's signature legislative initiative was its "Clear Skies" bill to establish a "cap-and-trade" regime for power plants to address emissions of sulfur dioxide (SO₂), oxides of *218 nitrogen ("NO_x") and mercury.⁶⁹ Although the Administration touted the bill as a great leap forward, an EPA analysis prepared for the Vice-President's Energy Task Force concluded that the existing Clean Air Act programs would reduce power plant emissions nearly twice as fast as the administration's legislative initiative.⁷⁰ Environmental groups pointed out that the bill would not only forestall progress until 2018 but also result in toxic "hot spots" where mercury exposures could reach dangerous levels. Worse, it would do nothing to address the pressing problem of global warming.⁷¹ Preoccupied with terrorism and foreign policy issues, the administration was unwilling to spend political capital on the initiative, and it got nowhere in a Congress that was deeply divided on environmental issues.⁷²

When it became clear that the Clear Skies initiative was dead, the Bush Administration attempted to accomplish the same deregulatory goals through the rulemaking process. The electric utility industry was demanding that the administration do something to relieve it of the new source review lawsuits that the Department of Justice had filed toward the end of the Clinton Administration, and the Bush Administration was happy to oblige. After several months of closed-door negotiations with industry lobbyists and officials from the Department of Energy, EPA promulgated two regulations to make the new source review process much easier to avoid.⁷³ Outraged *219 environmental activists claimed that the rules would allow thousands of modifications that were clearly covered by the statute to avoid new source review in perpetuity.⁷⁴ The first regulation survived judicial review for the most part, but the second did not.⁷⁵

D. Enforcement

The Clear Skies initiative and EPA's rulemaking initiatives had a powerful adverse effect on the agency's efforts to take effective enforcement action against companies that had for years unlawfully avoided new source review.⁷⁶ In his letter resigning from EPA, the Director of the agency's Office of Regulatory Enforcement complained that the agency was about to "snatch defeat from the jaws of victory" as reports of the agency's largely unsuccessful battles with "a White House that seems determined to weaken the rules we are trying to enforce" caused defendants in existing enforcement actions to walk away from settlement negotiations.⁷⁷ The agency's Inspector General issued a report in October 2004 concluding that the proposed changes to the new source review program had "seriously undermined" the agency's ability "to effectively enforce" the statutory new source review requirement.⁷⁸

E. Leavitt and Johnson Take Over

Administrator Whitman resigned in May 2003 after a frustrating two years of battling with deregulators in the White House.⁷⁹ Her *220 successor, Governor Mike Leavitt of Utah, became a strong advocate for the White House's policies on environmental issues, frequently overruling the EPA staff and its scientific advisory groups in the process.⁸⁰ He saw the 2004 elections as a "validation" of the Bush Administration's deregulatory agenda and a mandate to pursue it more vigorously.⁸¹ In early 2005, Leavitt resigned to become Secretary of Health and Human Services and was replaced by Stephen Johnson, a career government employee. Administrator Johnson lacked the gravitas of former governors Whitman and Leavitt, and it soon became clear that he was allowing White House officials in OMB and the Office of the Vice-President to determine the outcome of nearly all of

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

the initiatives that they cared about.⁸² Unlike Whitman and Leavitt, Johnson had to deal with a Democrat-controlled Congress that forced him to spend much of his time explaining the administration's controversial actions.⁸³

F. Ozone/Particulates

Not long after Johnson assumed the reins, the staff of EPA's air office initiated the statutorily required 5-year review of the national primary and secondary ambient air quality standards ("NAAQS") for particulate matter and ozone. The staff concluded that the scientific information that had become available after the previous revision of those standards in 1997 supported tightening the primary standards to make them more protective of public health.⁸⁴ In the case of ozone, the staff recommended that the agency promulgate a new secondary standard (to protect crops and vegetation) that reflected cumulative *221 exposures over the entire growing season.⁸⁵ The Clean Air Scientific Advisory Committee ("CASAC"), a committee created by statute to provide neutral scientific advice to the Administrator, agreed with the staff.⁸⁶ Yielding to pressure from OIRA and, in the case of the secondary standard for ozone, a direct order from President Bush, Administrator Johnson rejected the staff's recommendations and promulgated standards that only slightly increased the protection afforded to human health.⁸⁷ The D.C. Circuit remanded the particulate matter standard to EPA because it arbitrarily failed to protect a sensitive subpopulation of children who were especially subject to irreversible lung damage.⁸⁸ Environmental groups also challenged the ozone standard, but they later agreed to a stay of the litigation when the Obama Administration announced that it would reconsider the standard.⁸⁹

G. Limiting Mercury Emissions

The 1977 Amendments to the Clean Air Act required EPA to prepare a report on the health effects of human exposure to mercury and other toxic air pollutants emitted by power plants and to regulate those emissions as hazardous air pollutants if it found regulation to be "appropriate and necessary."⁹⁰ EPA belatedly made that finding in late 2000, thereby triggering its obligation to promulgate a hazardous air pollutant standard for toxic pollutants reflecting the maximum achievable control technology ("MACT") within two years.⁹¹ After *222 failing to persuade Congress to establish a cap-and-trade program for mercury emissions in its Clear Skies bill, the Bush Administration attempted to accomplish the same result by withdrawing the Clinton Administration "appropriate and necessary" finding and promulgating a legally dubious cap-and-trade program instead.⁹² The D.C. Circuit, in an opinion that found EPA's logic comparable to that of the Queen of Hearts in Lewis Carroll's *Through the Looking Glass*, vacated the regulations.⁹³

H. Global Warming

Although President George W. Bush had promised to take strong action to reduce emissions of greenhouse gasses during the 2000 campaign, he announced in March 2001 that the administration would disavow the Kyoto Treaty and refuse to regulate carbon dioxide emissions from power plants.⁹⁴ Relying heavily on input from the energy and electric utility industries and a tiny group of industry-funded scientists, the White House concluded that carbon dioxide was not a "pollutant" within the meaning of the Clean Air Act, and it urged companies to adopt voluntary approaches to reducing greenhouse gas emissions.⁹⁵ The announcement came as a surprise to EPA Administrator Whitman who was busily assuring both the American public and its European allies that the United States would regulate carbon dioxide emissions from power plants.⁹⁶

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Envtl. L....

Not surprisingly, the administration's Clear Skies bill contained no restrictions on emissions of greenhouse gas emissions, and the *223 administration vigorously opposed a bill introduced by Senators John McCain and Joe Lieberman that would have rewarded companies for reducing greenhouse gas emissions.⁹⁷ In September 2003, EPA announced that it did not have authority under the Clean Air Act to limit greenhouse gas emissions from automobiles because they were not “pollutants” within the meaning of the Clean Air Act.⁹⁸ The Supreme Court, however, reversed that determination and remanded the case to EPA to decide whether to make an ““endangerment” finding under a correct interpretation of the statute.”⁹⁹

Responding to the Supreme Court's remand, the EPA staff prepared a 300-page draft report concluding that greenhouse gas emissions from mobile sources endangered public health and welfare and should therefore be regulated as pollutants under the Clean Air Act.¹⁰⁰ After the White House rejected that conclusion, Administrator Johnson ordered the staff to prepare a document more to the liking of White House officials. The document that EPA published in July 2008 no longer contained the critical finding, and it stressed the need for more research and voluntary action.¹⁰¹ Later, Johnson issued a “midnight” interpretation of the Clean Air Act concluding that EPA and the states were not required to consider a source's potential to emit greenhouse gases in administering the statute's new source review requirements.¹⁰²

IV. SEIZING THE OFFENSIVE IN THE OBAMA ADMINISTRATION

A. Introduction

A confluence of crises during the last four years of the George W. Bush Administration put the proponents of regulatory relief on the defensive. The financial meltdown of 2008 and the resulting deep recession demonstrated to the world the consequences of lax *224 government regulation.¹⁰³ Even strong proponents of free markets like former Federal Reserve Board chairman Alan Greenspan conceded that effective government interventions into the marketplace were necessary for a robust economy.¹⁰⁴ The 2008 election of a bright young president who had run on a campaign of hope for the future of a nation suffering from the debilitating effects of the third assault on regulation gave environmental groups every reason to expect that a reinvigorated EPA would reverse many of the Bush Administration policies, complete many long-delayed rulemaking initiatives, and vigorously enforce the regulations that were already in place.¹⁰⁵

President Obama chose Lisa Jackson, the aggressive Commissioner of New Jersey's Department of Environmental Protection, to be his EPA administrator.¹⁰⁶ Bolstered by a 36 percent budget increase for fiscal year 2010, Jackson and her activist staff hit the ground running with more than 25 major rulemaking initiatives during her first year.¹⁰⁷ EPA also reviewed many of the Bush administration regulations with an eye toward revising or repealing them.¹⁰⁸ Jackson elevated science to a more prominent role in agency decision-making, and she assigned a less prominent role to cost-benefit analysis by placing a prominent critic at the head of the policy office.¹⁰⁹ EPA's enforcement presence also increased substantially during the first two years of the Obama Administration.¹¹⁰ To the *225 chagrin of environmental advocates, however, the president appointed his former University of Chicago Law School colleague, Cass Sunstein, to head the OIRA.¹¹¹ A strong proponent of cost-benefit-based regulatory decision-making and of aggressive White House review of agency regulations, Sunstein retained both the personnel and the review policies of the George W. Bush Administration.¹¹²

B. Greenhouse Gases

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

The administration's top environmental priority was to enact legislation establishing a cap-and-trade regime for greenhouse gas emissions. When the president decided to make health care reform the administration's highest overall legislative priority, however, greenhouse gas legislation moved to the back burner. The House of Representatives passed a bulky cap and trade bill in May 2009 over the unanimous opposition of House Republicans, but the bill proceeded slowly in the Senate where the chairman of the Environmental and Public Works Committee attempted in vain to work out a deal with the Republican leadership.¹¹³ As greenhouse gas legislation languished in the Senate, the U.S. Chamber of Commerce and several grass roots organizations funded by energy interests attacked the House Bill as “cap-and-tax” legislation.¹¹⁴ By the time that Congress completed the health care bill in March 2010, it was clear that greenhouse gas legislation could not attract the 60 votes needed to end a promised Republican filibuster, and President Obama made no effort to revive the legislative initiative.¹¹⁵

***226** During the period of legislative inactivity, Administrator Jackson made a formal finding that greenhouse gas emissions “endangered” the environment, thereby triggering EPA's statutory obligation to regulate motor vehicle emissions.¹¹⁶ EPA and the National Highway Traffic Safety Administration then jointly promulgated regulations limiting greenhouse gas emissions and raising fuel economy standards for sedans, SUVs and pickups.¹¹⁷ Withdrawing a Bush Administration determination, Jackson concluded that increased emissions of greenhouse gases did trigger the Clean Air Act's new source review requirements.¹¹⁸ Soon thereafter, EPA promulgated an ambitious “tailoring” rule requiring states to incorporate greenhouse emissions into their routine reviews of modifications of existing industrial facilities.¹¹⁹

C. Ozone

Not long after Administrator Jackson was sworn in, the agency announced that it would reconsider the 2008 national ambient air quality standards (NAAQS) for ozone based on the information available to the agency in 2008 rulemaking.¹²⁰ The D.C. Circuit stayed the pending challenges to the Bush Administration 0.075 parts per million (ppm) ozone standards, and EPA agreed to stay implementation of the those standards while it undertook its reconsideration.¹²¹ In January 2010, EPA published a notice of proposed rulemaking announcing that Administrator Jackson had “serious cause for concern” regarding whether the 2008 standards ***227** met the Clean Air Act's requirements.¹²² EPA proposed to set the primary standard at some point between 0.060 and 0.070 ppm and to change the form of the secondary standard from an 8-hour average to the more stringent cumulative seasonal form that President Bush had personally rejected.¹²³

D. Coal Ash

On December 22, 2008, approximately 5.4 million cubic yards of slurry generated by the Tennessee Valley Authority's Kingston fossil fuel power plant poured into the Emory River when a retaining dike at a coal ash impoundment ruptured. The spill inundated more than 300 acres of land, destroyed three homes, and damaged dozens of others.¹²⁴ The Kingston catastrophe inspired public demands for greater protection from hundreds of similar impoundments associated with coal-burning power plants that were subject only to uneven state oversight.¹²⁵ Soon after the Kingston spill, Congressman Nick Rahall (D-WV) introduced a modest bill authorizing the Department of Interior to promulgate uniform federal standards for new coal ash impoundments throughout the country.¹²⁶ Although three congressional committees devoted six hearings to the issue, utility industry lobbyists were able to forestall any legislative action during the 111th Congress.¹²⁷

***228** On the administrative front, Administrator Jackson promised to reevaluate the agency's prior reluctance to regulate coal ash by the end of 2009.¹²⁸ The draft notice of proposed rulemaking that Jackson sent to OIRA in October 2009 would have

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Envtl. L....

regulated discarded coal ash as a hazardous waste, thereby subjecting it to far more stringent controls than state regulatory requirements, but it would have exempted the beneficial reuse of coal ash in wallboard, concrete, and other products, which accounted for about 37 percent of the coal ash that power plants generated.¹²⁹ OIRA held more than 47 meetings with representatives of various interest groups, two-thirds of which were with industry representatives.¹³⁰ Environmental groups saw the OIRA meetings as “an opportunity for industry to go into OMB and pre-negotiate the rule before it hits the streets.”¹³¹ In May 2010, OIRA sent a heavily revised proposal back to EPA. The original proposal to regulate coal ash as a hazardous waste was now one of three alternatives, the other two of which effectively left coal ash regulation to the states subject to broad EPA oversight.¹³² The *229 OIRA-edited regulatory impact assessment for the rule made it clear that OIRA was greatly influenced by the industries' claim that regulating discarded coal ash as a hazardous waste would “stigmatize” beneficial reuse of coal ash and thereby destroy the secondary market for that product.¹³³

V. THE FOURTH ASSAULT

A. Introduction

Before the Obama Administration was fully in place, the business community, conservative think tanks and the conservative media echo chamber had launched a fourth assault on federal environmental regulation.¹³⁴ As the country struggled with a severe economic recession, they complained that government ““red tape” was crippling business and destroying jobs.¹³⁵ For example, the Chamber of Commerce hosted a “jobs summit” to bemoan the “tsunami of regulation” that the new administration was creating.¹³⁶ President Obama's initial response to this salvo was to mount an aggressive defense of EPA and the other regulatory agencies.¹³⁷ He did not, however, seize the offensive by pressing forward with financial reform or climate change legislation, focusing his legislative attention instead on health care reform.

The president's failure to press forward with aggressive financial reform legislation gave the business community an opportunity to redirect public resentment at Wall Street bailouts and huge executive *230 bonuses away from corporate America and toward the government. Two groups funded by oil barons Charles and David Koch and Andrew Mellon heir Richard Mellon Scaife, Americans for Prosperity and FreedomWorks, seized on an anti-government rant by CNBC business reporter Rick Santelli to create the Tea Party movement.¹³⁸ With financial support and training from the two “grass roots” organizations and continuous coverage on Fox News, the movement rapidly grew into a formidable political force. Although environmental regulation was an unlikely target for a populist movement spawned by an economic downturn, EPA rivaled Obamacare as a target for vilification by Tea Party activists.¹³⁹

As the 2010 mid-term elections approached, the mining and electric utility industries contributed heavily to Republican candidates who took anti-regulatory stances.¹⁴⁰ The Chamber of Commerce devoted \$75 million to attack ads aimed at candidates that it deemed to be supporters of strong federal regulation.¹⁴¹ FreedomWorks flew 40 local Tea Party leaders to Washington, D.C. for a 3-day “boot camp” where they received special training in how to get out the vote for Tea Party-supported candidates in the November elections.¹⁴² EPA's greenhouse gas regulations became a campaign issue as Tea Party candidates accused EPA of killing jobs in pursuit of an unproven climate change theory.¹⁴³ The elections returned control of the House of Representatives to a Republican Party with a vocal Tea Party faction that was determined to prevent EPA from promulgating more regulations.¹⁴⁴

***231 B. Obama Administration Reaction to the 2010 Election**

President Obama reacted to the renewed assault on federal regulation with a peace offering to the regulated industries. Accepting the undocumented premise that federal regulations were destroying jobs, the administration, in a reprise of the Reagan Administration, invited the business community to nominate job-killing regulations for revision or repeal.¹⁴⁵ OIRA Administrator Sunstein assured the business community that his agency would protect its interests while EPA's proposed rules were being finalized.¹⁴⁶ Soon thereafter, President Obama signed a new executive order requiring executive branch agencies to "identify and consider" regulatory approaches that "reduce [d] burdens and maintain[ed] flexibility and freedom of choice" for the affected industries.¹⁴⁷ It also required them to come up with a plan for periodically reviewing their existing regulations with the object of rewriting or repealing regulations that were "outmoded, ineffective, insufficient, or excessively burdensome."¹⁴⁸

Ozone: In the year following the election, a coalition of coal and utility companies spent around \$35 million on television advertising criticizing EPA's proposals for regulating power plants.¹⁴⁹ One ad featured a businessman with a briefcase struggling to stay aboard a bucking bull while the narrator observed that "too many Americans are just trying to hang onto their jobs." The narrator wondered why EPA was "in a rush to push regulations that would saddle Americans with higher energy costs and throw even more of us out of work?"¹⁵⁰ The American Coalition for Clean Coal Energy hit the road with a ***232** mobile classroom to educate citizens on the virtues of coal-generated electricity at state fairs and other public events.¹⁵¹

House Majority Leader Eric Cantor (R-Virginia) identified the ozone standard as one of several "job destroying" regulations that the House would target for elimination during the Fall 2011 session.¹⁵² The affected industries and 93 House members urged EPA to abandon its reconsideration of the 2008 ozone standard and return to the statutory five-year cycle that was scheduled for completion in 2013.¹⁵³ Undeterred, Administrator Jackson told a Senate committee that the agency would go forward with the standard -- setting process, because the 2008 standards "were not legally defensible given the scientific evidence in the record."¹⁵⁴

EPA sent a draft final rule to OIRA in July 2011 that set the level of the 8-hour primary standard at 0.065 ppm and established a separate cumulative, seasonal secondary standard.¹⁵⁵ After meeting with White House Chief of Staff William E. Daley, a former lobbyist for the Chamber of Commerce who President Obama had brought on board to smooth relations with the business community, Jackson offered a compromise that would have set the primary standard at 0.070 ppm.¹⁵⁶ The affected industries put on a full court press to force the agency to withdraw the proposal. The multi-faceted strategy involved a massive lobbying campaign aimed at the White House and Congress, a letter-writing campaign from industry leaders, and an advertising campaign aimed at swaying Washington policymakers.¹⁵⁷

***233** At a meeting with Daley, OIRA Administrator Sunstein, and EPA Assistant Administrator Gina McCarthy in the West Wing of the White House, industry representatives produced a map highlighting the congruence between the states that President Obama had won by narrow margins in 2008 and the states containing areas that would not be in attainment with the new ozone standard. Before an industry spokesperson had a chance to spell out the political implications of the rule, Daley cut him off with a terse "I got that."¹⁵⁸ When a representative of an environmental group presented polls demonstrating strong public support for clean air at a meeting later that day, Daley cut him off with an expletive.¹⁵⁹

On September 1, 2011, President Obama summoned Administrator Jackson to the Oval Office where he told her that he had decided against going forward with a more stringent ozone standard because of the cost and uncertainty that it would impose on

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

industry and the states.¹⁶⁰ Despite this embarrassing public repudiation of Jackson and her staff, the president promised in a press release that he would “continue to stand with the hardworking men and women at the EPA as they strive every day to hold polluters accountable and protect our families from harmful pollution.”¹⁶¹ The formal letter to EPA from OIRA Administrator Cass Sunstein contained an almost verbatim recapitulation of the industry arguments against EPA's standard.¹⁶² It did not, however, explain how that injunction was consistent with the Clean Air Act's proscription on considering regulatory costs and burdens in setting NAAQS.¹⁶³

Coal Ash: Following the 2010 elections, EPA put the coal ash regulations on indefinite hold. In the meantime, the utility industry *234 mounted a public relations campaign urging the agency not to list coal ash as a hazardous waste.¹⁶⁴ As EPA cogitated over the rule, utility companies disposed of more than 112 million pounds of coal ash in slurry ponds in 2010, an increase of 9 percent over the previous year.¹⁶⁵ And the agency identified more than 450 additional coal ash impoundments, 46 percent of which were unlined, to bring the total to 1,161 nationwide.¹⁶⁶

Utility MACT: After environmental groups sued EPA for failing to respond to the D.C. Circuit remand of its mercury rule, EPA agreed to publish a final regulation by November 16, 2011.¹⁶⁷ In March 2011, the agency proposed a new standard for new and existing coal and oil-fired power plants under its authority to regulate hazardous air pollutants.¹⁶⁸ It proposed to reaffirm its 2000 finding that a hazardous air pollutant standard was ““appropriate and necessary” to control emissions of mercury, acid gases, and various other heavy metals.¹⁶⁹ It then proposed stringent emissions limitations for new and existing power plants for fine particulate matter (a surrogate for heavy metals other than mercury), hydrogen chloride (a surrogate for acid gases) and mercury.¹⁷⁰ Having taken a great deal of criticism from environmental groups for the ozone NAAQS withdrawal, the White House supported EPA's efforts. On December 21, 2011, EPA promulgated a stringent ““Utility MACT” rule that required new and existing sources to install the maximum achievable control *235 technology.¹⁷¹ Under the statute, the rules had to be implemented within three years, with a possible extension for another year.¹⁷² Administrator Jackson promised to make “very liberal use of the fourth year,” and she suggested that the agency might exercise its enforcement discretion to give some companies a fifth year to bring units into compliance.¹⁷³

C. Congressional Assault

1. Introduction

Less than a week after the 2010 elections, FreedomWorks hosted a retreat for the 87 Republican freshmen, at which its Chairman, Dick Armey, exhorted them not to stray from the deregulatory principles they had espoused during the campaign.¹⁷⁴ During the first nine months of 2011, coal-mining interests spent \$16.5 million and electric utility interests spent \$78.4 million on lobbying EPA and Congress.¹⁷⁵ A coalition of coal and utility companies spend an additional \$35 million on television advertising criticizing the recent EPA initiatives.¹⁷⁶ Environmental groups responded with their own public relations campaigns.¹⁷⁷

The House Republican leadership got the message. Promising far more aggressive oversight over the regulatory agencies, the new *236 chairman of the House Committee on Oversight and Government Reform asked industry groups to help him assemble still another “hit list” of federal regulations that should be revised or repealed.¹⁷⁸ The National Association of Manufacturers responded with a list that included every major regulation that was currently pending before EPA.¹⁷⁹ During

the month of March 2011, EPA Administrator Lisa Jackson testified seven times before House committees, during many of which she endured such intense questioning that the *New York Times* characterized the hearings as “target practice.”¹⁸⁰

2. Climate Change Deauthorizing Legislation

Fully one-half of the newly arrived House Republican freshmen questioned whether human activities were in fact contributing to global warming.¹⁸¹ In early March 2011, Rep. Fred Upton (R-Mich.) and Senator James Inhofe (R-Okla.) introduced identical bills to prohibit EPA from promulgating any regulation, taking any other action, or even taking into consideration emissions of greenhouse gases to address climate change.¹⁸² The Bill would have retroactively repealed EPA's original “endangerment” finding and all of the regulations that it had promulgated to implement its greenhouse gas *237 reduction program.¹⁸³ At hearings before a House Energy and Commerce subcommittee, Republican members spent more than two hours berating EPA Administrator Jackson, asserting that the scientific underpinnings of her finding was a hoax, and accusing the Obama Administration of killing jobs.¹⁸⁴ The House easily passed the Upton bill on April 7, 2011, but the Inhofe bill went nowhere in the Democrat-controlled Senate.

3. Coal Ash Deauthorization Legislation

In mid-April, 2011, a subcommittee of the House Committee on Energy & Commerce held a hearing on coal ash disposal that differed dramatically from the hearings it held during the 111th Congress.¹⁸⁵ Chastised for discouraging the beneficial reuse of coal ash, EPA Assistant Administrator Mathy Stanislaus tried in vain to explain that the issue concerned the characteristics of coal ash when mismanaged in a retention pond and not its characteristics when put to beneficial uses.¹⁸⁶ The committee reported out a bill in mid-July 2011 that would have divested EPA of authority to regulate coal ash and required states to regulate the disposal of coal ash in containment structures that met various design, groundwater monitoring and location requirements.¹⁸⁷ The full House approved the bill on October 14, 2011.¹⁸⁸

When it became clear that the Senate would not take up a coal ash bill, its proponents in the House attached it to a “must-pass” bill to *238 reauthorize essential transportation programs.¹⁸⁹ The Utility Solid Waste Activities Group created a website called “Regulate Coal Ash Right” that appealed to citizens to “tell Congress to include bipartisan coal ash provisions in the surface transportation bill.”¹⁹⁰ Lobbyists for the coal ash and electric utility industries targeted each of the members of the conference committee for special attention.¹⁹¹ It was all for naught, however, as the Democratic senators on the conference committee refused to go forward with a bill containing the rider.¹⁹²

4. Utility MACT Deauthorization Legislation

In April 2011, Senators Joe Manchin (D-West Virginia) and Rob Portman (R-Ohio) introduced an industry-drafted bill that would have reduced the stringency of the Utility MACT rule and extended the compliance deadlines until at least 2020.¹⁹³ Later that month, a subcommittee of the Energy and Commerce Committee held hearings on energy issues that provided an ideal opportunity for industry representatives to issue dire warnings about how the rule would increase electricity rates and cause rolling brownouts.¹⁹⁴ At a hearing two months later before a subcommittee of the Senate Committee on Environment and Public Works, EPA Assistant Administrator Regina McCarthy expressed the agency's confidence that the electric utility industry could meet the rule's requirements with widely available pollution reduction technologies without threatening the

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

reliability of *239 the national power grid.¹⁹⁵ Neither house of Congress passed a standalone Utility MACT deauthorization rule during the 112th Congress.

5. The 2011 Continuing Resolution

Recognizing that it would be difficult to persuade the Democrat-controlled Senate to enact any deauthorizing legislation, and conscious of the possibility of a presidential veto of such legislation, the regulated industries pursued an alternative strategy of attaching environmental riders to must-pass legislation.¹⁹⁶ The first opportunity was the continuing resolution that Congress had to pass at the outset of the 112th Congress to appropriate funds for the government agencies for the remainder of the 2011 fiscal year.¹⁹⁷ The House bill contained many riders preventing EPA from expending any of the appropriated funds on a number of regulatory initiatives, including promulgating or enforcing regulations limiting emissions of greenhouse gases, classifying coal ash as a hazardous waste, and revising the national ambient air quality standards for coarse particulate matter.¹⁹⁸ The showdown came in the Senate, where the environmental riders became a major sticking point in the negotiations over the bill as the clock wound down toward a government shutdown.¹⁹⁹ At the last possible moment, the House leadership agreed to drop the environmental riders from the bill, and both houses passed a continuing resolution to fund the government for the remainder of the fiscal year.²⁰⁰

*240 6. The 2012 Appropriations Bill

The FY 2012 appropriations bill for EPA provided the next opportunity for deregulatory riders. The bill reported out of the House Appropriations Committee contained even more riders than the continuing resolution.²⁰¹ Representative Mike Simpson (R-Idaho) explained that the riders were necessary because “[m]any of us think that the overregulation from E.P.A. is at the heart of our stalled economy.”²⁰² In a reprise of President Clinton's showdown with Newt Gingrich, President Obama threatened to veto the bill if it contained anti-environmental riders.²⁰³ After much disputation, the FY 2012 appropriation bill was passed at the end of the year without the riders.²⁰⁴

CONCLUSION

Measured by the changes it has induced in the environmental statutes, the Fourth Assault on regulation has thus far been a failure. None of the statutes has been amended, and even riders in appropriations bills have thus far run aground. The Fourth Assault has, however, had a discernable impact on EPA's efforts to implement those statutes under Administrator Lisa Jackson. The White House stopped the ozone rulemaking dead in its tracks, and several other rulemaking initiatives, like the coal ash rule, have slowed down considerably. The “look back” exercise required by President Obama's executive order, like similar exercises required by nearly all of his predecessors, diverted precious time and resources away from the agency's primary mission and did little to mollify skeptical companies.

The 2012 elections did little to change the political dynamic underlying the Fourth Assault. The Tea Party faction of the *241 Republican Party was somewhat less in evidence during the 2012 elections than in the 2010 elections, but Republican candidates throughout the country were especially careful not to stray far from the Tea Party line. This almost certainly contributed to the Republican Party's failure to regain control of the Senate in a year in which more Democratic seats were open than Republican seats. The fact that the Republican Party retained control of the House of Representatives, combined with the fact that Tea Party advocates make up a significant proportion of that majority, should guarantee that the Fourth Assault will continue in the House for at least another two years. Whether the assault will be as aggressive in the House as it was during the 112th Congress will

EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

depend on whether the Republican leadership feels sufficiently chastised by the outcome of the presidential and Senate races to attempt to moderate the tone of the vocal EPA critics in the membership.

The battered occupants of the Federal Triangle Complex (the site of EPA's headquarters) have survived three powerful assaults from the business community and its allies in Congress, conservative think tanks, the conservative echo chamber, and at times even from within its own walls. In 2009, it seized the offensive with a number of major rulemaking efforts, some of which (like the greenhouse gas initiative) have become law, but many of which remain bottled up within the administration. With the vote of confidence that the administration received in 2012, EPA should remain on the offensive by completing important regulatory initiatives, like the coal ash disposal regulations and the new source performance standards for fossil fuel-fired power plants, while the forces aligned against it are in some disarray. There are few indications that the business community and its allies plan to moderate the Fourth Assault in light of the 2012 elections. EPA and its allies should meet it head on with new and stronger protections to allow the environment upon which we all so greatly depend to flourish.

Footnotes

- ^{a1} Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law, University of Texas School of Law. The themes highlighted in this article are explored in greater detail in many additional regulatory contexts in THOMAS O. MCGARITY, *FREEDOM TO HARM* (Yale University Press, forthcoming 2013).
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EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Envtl. L....

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EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

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EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Envtl. L....

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EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Envtl. L....

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EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

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EPA AT HELM'S DEEP: SURVIVING THE FOURTH..., 24 Fordham Env'tl. L....

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